

FILED
Court of Appeals
Division II
State of Washington
1/11/2019 2:12 PM
NO. 51968-2-11

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In re:

JOSEPH A. BUNDY

Respondent

v.

PAMELA J. RUSH,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY

REPLY BRIEF OF APPELLANT

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I. REPLY TO INTRODUCTION AND FACTS

The issue in this appeal is not whether Mr. Bundy is voluntarily underemployed. Mr. Bundy is not employed at all. In 2016, he worked both full-time for Tacoma Police Department and on his side-business flipping houses. (CP 399). In 2016 he earned an additional \$1,299.22 per month in income from the business. (CP 190). In 2017 he fixed up and sold a house with his brother. (CP 148). The sale netted a profit of \$31,181.22. (CP 148). Mr. Bundy claims the profit was “split four ways” but it is unclear whether his wife received one of the shares. (CP 259). He voluntarily resigned and retired from the Tacoma Police to pursue a house flipping business with his brother. Although he retains an interest in the business, he is no longer doing the labor portion of flipping houses. In fact, pursuant to his testimony, he is not currently working in any capacity.

Mr. Bundy boasted about the lucrative business and even turned down contracting work because he was too busy. (CP 166). He planned to continue with the business after he resigned from the Tacoma Police and that is exactly what he did. (CP 166) (CP259). In his free time, Mr. Bundy also continued to pursue various high-risk physical activities including motocross. (CP 289-290).

After Ms. Rush filed her Petition to Modify, however, Mr. Bundy stopped flipping houses, claiming he could not sustain the manual labor

involved. (CP 259-260) Mr. Bundy also denied that the business was profitable but failed to provide business tax returns. (CP 250). Notably, the business bank account contained **\$228,354** as of January 2018. (CP 250).

Additionally, Mr. Bundy's personal account shows significant deposits from unknown sources. (CP 216). From January through December 2016 Mr. Bundy deposited \$13,167.02 from unknown sources, not including an unusual deposit of \$4,318.28 from the Tacoma Police in August 2016. (CP 216). The deposits increased in 2017. In just three months, from June 2017 (one month prior to retirement) to September 2017, Mr. Bundy deposited \$13,627 from unknown sources. (CP 216). Mr. Bundy claims he is done flipping houses. He is now unemployed.

Thus, the issue for the trial court was whether Mr. Bundy's unemployment is voluntary. If so, pursuant to RCW 26.19.071(6) the court must impute income to him and, in the absence of current wage information, RCW 26.19.071(6)(b) requires the court to use his historical full-time earnings.

The court abused its discretion pursuant to RCW 26.19.071 by failing to find that Mr. Bundy is voluntarily unemployed and imputing income to him. There is neither testimony nor substantial evidence that Mr. Bundy is legally disabled or physically incapable of working. Had he

sustained a disability that made it impossible to continue working as a police officer, he could have pursued early retirement. (Response Brief 16). He did not. Instead, he resigned and retired to flip houses, trading one physically demanding occupation for another. He later chose to stop working altogether. Therefore the trial court should have found that Mr. Bundy is voluntarily unemployed and imputed income to him based on historical rate of pay as RCW 26.19.071(6) requires. This court should reverse.

II. ARGUMENT

1. The Trial Court Abused Its Discretion By Not Imputing Income To The Father At His Historical Rate Of Pay Pursuant To RCW 26.19.071(6) Despite The Fact The Father Is Voluntarily Unemployed.

RCW 26.09.071(6) requires the court to impute income to a parent that is voluntarily unemployed. Voluntary unemployment is “unemployment that is brought about by one’s own free choice and is intentional rather than accidental.” *In re Marriage of Brockopp*, 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995). The court shall determine whether a parent is unemployed based upon their work history, education, health, age and any other relevant factors. *Dewberry v. George* 115 Wn. App. 351, 62 P.3d 525 (2003); *In re Marriage of Clarke* 112 Wn. App.

370, 375-76, 48 P.3d 1032 (2002); *Marriage of Schumacher*, 100 Wn. App. 208, 212, 997 P.2d 399 (2000).

The court must impute income to a parent that is voluntarily unemployed or underemployed. However, the court may not impute income to a parent that is voluntarily underemployed but “gainfully employed on a full-time basis” unless the parent is purposefully underemployed in an effort to reduce their income. See RCW 26.19.071(6). The statute does grant the same reprieve to parents who are voluntarily unemployed.

In this case, the trial court relied entirely on this provision of the child support statute, but the provision is not applicable. Mr. Bundy is not employed at all.

The trial court abused its discretion by deeming Mr. Bundy “underemployed,” despite the fact Mr. Bundy, by his own admission, is not working and is unemployed. Mr. Bundy retired from police work in 2017 because he “*no longer wanted to*” work to be a police officer and he felt he “*had a right to retire*” (CP 257). Instead, he worked on flipping houses with his brother, which he believed would be more financially lucrative than police work.

The house flipping business was a source of pre-retirement and post-retirement income. In 2016, he received an extra \$1,229 per month

from the enterprise while still working as a police officer. In 2017, he physically improved and sold a house with his brother. He expected the business income to exceed his earnings as a police officer. When Ms. Rush filed her petition, however, he suddenly claimed the business was not profitable and he asserted that he was not going to flip houses any more. Pursuant to his own testimony, he is presently unemployed.

Nonetheless, the court incorrectly focused on whether Mr. Bundy's decision to retire from police work was reasonable. The court found that Mr. Bundy could no longer meet the physical demands of police work and, therefore, reasonably retired when he became eligible to do so.

The court's finding that Mr. Bundy could no longer work as a police officer is unsupported by substantial evidence. Mr. Bundy failed to provide medical records documenting the health issues and injuries he "believes" prohibit him from policing.¹ (CP 257, line 18). While self-serving declarations were provided to the trial court, no medical or other records, that easily could have been provided to substantiate his claims,

¹ Contrary to Mr. Bundy's contention, Ms. Rush testified that Mr. Bundy indulged in taking naps during the day *prior to* his claimed injuries or ailments not *because of* the claimed injuries or ailments.

were provided.² Mr. Bundy did not have to prove that he was disabled to retire, because he was eligible for retirement benefits. He admits, however, that he has not applied for disability or been deemed disabled by any court or governmental agency. He also admits there is a significant difference between his retirement earnings (\$2,873 gross per month) compared to his non retirement earnings (\$8,420.58) resulting in diminished child support for the parties' son. The evidence submitted to the trial court was that Mr. Bundy voluntarily quit his job as a Tacoma Police officer to retire. This is the definition of voluntary unemployment. Yet, the trial court did not impute any amount of income to Mr. Bundy pursuant to RCW 26.19.071.

There is neither evidence nor testimony that Mr. Bundy is not employable. He failed to establish that he could not find other light-duty work as a police officer, return to his career as a security officer, or find other employment. Mr. Bundy's extensive experience in law enforcement qualifies him for a variety of other occupations. Given that he is currently receiving retirement income, this additional work would not need to pay

² Mr. Bundy providing medical records to substantiate his medical disability claims is the same as requiring a parent to provide tax returns and paystubs to substantiate the parent's income. The trial court does not base income determination solely on testimony alone. Also, the court did not make any credibility determination on the record regarding Mr. Bundy and Ms. Rush in any of the findings.

his historical income. However, instead, he simply chose not to find other employment, which is the very definition of voluntary unemployment.

Mr. Bundy can choose not to work because, unlike Ms. Rush, he has the benefit of retirement and rental income, and has an interest in his real-estate business. (CP 259, CP 288). He also has in excess of \$200,000 in a deferred compensation account from which he can draw any amount monthly without penalty to maintain his previous lifestyle. (CP 254). His bank statements show that he has substantial frivolous expenses such as eating out almost every day, gym memberships, body building supplements, gun shop purchases, motorcycle shop purchases, and auto body shop purchases. (CP 216). Mr. Bundy also owns numerous classic cars, two boats, four motorcycles, and trailers. He also owns 43 acres of land in Grant County that is for sale. (CP 216-217). Nonetheless, the trial court allowed Mr. Bundy to reduce his income to a level lower than the median for his age and excused him from contributing to the child's historical extracurricular activities.

A court's decision is manifestly unreasonable and therefore reversible if it is "*outside the range of acceptable choices given the facts and applicable legal standards; it is based upon factual findings that the record does not support; it is based upon an incorrect standard of law or the facts do not meet the requirements of the correct standard.*" *State v.*

Rindquist 79 Wn. App. 786, 793, 905 P.2d 922 (1995). In this case, the trial court's ruling is based on factual findings the record does not support and a misapplication of the law. Mr. Bundy admits he is voluntarily retired (although he is not of normal retirement age) and he failed to establish that he is physically or otherwise incapable of finding employment. Under the circumstances, RCW 26.19.017(6) requires the court to impute income to Mr. Bundy, regardless of how much regard the court may have for his service as a police officer or his decision to leave that occupation specifically. The court abused its discretion when it declined to impute income as the statute requires to a parent who is voluntarily unemployed. This court should reverse.

2. The Court Abused Its Discretion In Finding That The Father's Retirement Income To Be Equivalent To Full-Time Gainful Employment.

Pursuant to RCW 26.19.071(6) "a court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds the parent is purposefully underemployed to reduce the parent's child support obligation."

The term "gainful employment" is not defined by the child support statute. *In re Marriage of Peterson*, 80 Wn. App. 148 (1995). The legislature did, however, define the term elsewhere in the RCW's.

Specifically, RCW 7.68.020(5) defines gainful employment as “engaging on a regular and continuous basis in a lawful activity from which the person derives a livelihood.” The court adopted and applied that definition in *Peterson, supra*, which is discussed further below.

In this case, Mr. Bundy retired from police work to flip houses with his brother. There is no indication that Mr. Bundy changed his career in order to reduce his support obligation. To the contrary, he expected to the real estate business to provide significant income, in addition to his retirement income. (CP 165-166).

In 2016, prior to retirement, Mr. Bundy earned an extra \$1,299 per month from the business and in 2017 he fixed up and sold a home for profit. (CP 190). The parties disputed how much income Mr. Bundy was earning from the business at the time Ms. Rush filed her petition. Mr. Bundy failed to provide business tax returns but as of January 2018 the business account held **\$228,354.25** in funds. (CP 250). Additionally, Mr. Bundy’s personal account records showed several large, unaccounted for deposits. (CP 126).

After Ms. Rush filed her petition, Mr. Bundy claimed that his house flipping business was not profitable and he no longer intended to flip houses. (CP 259). As a result, he is not currently “engaging on a regular and continuous basis” in any activity from which he “derives a

livelihood.” RCW 7.68.020(5). Therefore, the statutory language pertaining to *underemployment* does not apply.

Mr. Bundy’s reliance on *Peterson, supra*, is misplaced. In *Peterson*, the father was a 43 year old law school graduate working full-time at a bail bond company. See *In re Marriage of Peterson* 80 Wn. App. 148, 906 P.2d 1009 (1995). The court deemed Mr. Peterson voluntarily underemployed because he earned less than one-half of the median income for a person his age despite his higher education. *Peterson*, 80 Wn. App. at 154. Here, however, the father retired from police work to flip houses, and then quit flipping houses, leaving him completely unemployed.

This case does have one key correlation to *Peterson, supra*, however. Like *Peterson*, Mr. Bundy’s retirement income is less than the median for a man his age despite the fact the fact he has substantial experience in law enforcement. The median income for men ages 55-64 is \$3,735. Mr. Bundy’s net income, pursuant to the court’s order, is just \$3,042.35.

There are no analogous published cases that support the trial court’s conclusion that “earning the right to full retirement benefits is equivalent to full-time gainful employment.” (CP 374. Ms.). Ms. Rush referenced the unpublished case, *Marriage of Alwin, supra*, in her original brief because it contained similar facts and was argued to the trial court

below. Pursuant to GR 14.1 unpublished cases have no precedential value and are not binding. However, the court can give persuasive value to unpublished opinions that are filed on or after March 1, 2013. The unpublished *Marriage of Alwin, supra*, opinion was filed in 2009. Thus, there is no published or unpublished analogous case law for the trial court's conclusion. The case Mr. Bundy relies on, *Marriage of Peterson, supra*, is not analogous and does not address the issue of retirement benefits.

Mr. Bundy's attempts to distinguish *Alwin, supra*, fall short. In *Alwin*, the court imputed income to a father who voluntarily decided to retire. The father argued that imputation of income denied him the ability to retire. The Court of Appeals rejected that argument, reasoning that the father could always retire and seek a modification of support "when age or health justifies it." 2009 WL 3260912, at *5. Mr. Alwin retired at age 62 because he was eligible to do so and no longer wished to continue his position at the university. In this case, the trial court did not find that Mr. Bundy's "age and health" justified his decision to stop working altogether at age 56. To the contrary, the court only found that Mr. Bundy's decision to retire as an active duty *police officer* was reasonable given his claimed health issues. However, as stated above, the record contains no medical records or other evidence to permit such finding. What is more, there is

neither testimony nor evidence that Mr. Bundy is no longer employable or otherwise capable of working full time in another capacity.

3. The Trial Court Did Not Properly Calculate The Father's Income When Computing Child Support.

Pursuant to RCW 26.19.071(6), in the absence of records of a parent's actual earnings, the court shall impute income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;
- (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

RCW 26.19.071(6).

Had Mr. Bundy continued to work as a police officer instead of voluntarily retiring his position, he would have earned \$8,420.58 per month in addition to his other income. Pursuant to RCW 26.19.071(6) the trial court abused its discretion by failing to impute income to Mr. Bundy using his full-time earnings at historical rate of pay. Instead, the court

calculated support using only his retirement income of \$2,873 and rental income of \$311.42. The total combined income is just \$3,184.35. His net income is calculated at \$3,042 which is \$693 less than the median net income for a man his age.

The court also abused its discretion by not including Mr. Bundy's other income on the child support worksheets. RCW 26.19.071(3) lists the specific income sources that are to be included in a parent's gross income for purposes of calculating child support: (1) self-employment income, (2) rental income and (3) retirement benefit income are all included in RCW 26.19.071(3).

In the case sub judice, financial records provided to the trial court contain clear evidence that Mr. Bundy received other income in addition to the pre-retirement and retirement income he received from his employment with Tacoma Police Department.

Specifically, Mr. Bundy admitted that he has a financial stake in a real estate business with his brother. Mr. Bundy received \$1,299.22 net per month in additional income from the enterprise in 2016. (CP 190). He failed to provide tax returns for the business but as indicated above, the LLC account contained \$228,354 in funds as of January 2018. (CP 250). Mr. Bundy fixed up and sold a property with his brother in 2017. That sale netted \$31,000 in pre-tax profit. (CP 259).

However, the court failed to include any income from the sale or from the business, despite evidence that it was and is a source of income for Mr. Bundy pursuant to RCW 26.09.071. The court accepted Mr. Bundy's assertion that the 2017 house project was a "one-time investment" despite the fact that there is neither testimony nor evidence that Mr. Bundy no longer has a financial stake in the business. To the contrary, Mr. Bundy only testified that he would no longer participate in the manual labor associated with house flipping. (CP 260).

Additionally, Mr. Bundy admittedly owns a rental property in Puyallup, WA. Pursuant to the financial records Mr. Bundy provided, he receives an average of rental income profit of \$419.83 from the property he leases. (CP 402). Despite this evidence, the trial court did not include the proper amount of rental income on the child support worksheets.

Further, it was undisputed that Mr. Bundy receives an additional \$500 per month net benefit from VEBA for uninsured medical expenses through age 65. (CP 216) The trial court abused its discretion when dismissing the issue, noting that the VEBA "*is not an issue that was argued before me previously and I did not see this in the temporary orders.*" Ms. Rush did address the VEBA benefits in her declaration provided to the Court in support of her petition. (CP 216). (CP 292).

So the claim that this was argued for the first time on reconsideration is not accurate. This issue was argued in Ms. Rush's declarations to the Court. Therefore, the trial was not correct when it asserted that VEBA was not an issue presented to the court. The trial court should have included this additional \$500 in net income per month that Mr. Bundy receives pursuant to RCW 26.19.071(3).

4. The Trial Court Abused Its Discretion In Not Ordering The Parents To Pay Their Proportionate Share Of The Child's Extracurricular Activities.

RCW 26.19.080 governs the payment of daycare or other child rearing expenses and provides that those expenses shall be paid in the same proportion as the basic child support obligation. Specifically, RCW 26.19.080 in relevant part states,

...Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation. ...

Id. See *Marriage of McCausland*, 159 Wn.2d 607 (2007).

The parties' child has historically participated with both parents' financial support in little league, club baseball, and associated clinics, club and recreational soccer, recreation club football, karate, and other youth camps. (CP 153-154, CP 156-164)). The child support order did not address the payment of these activity expenses. Ms. Rush testified

that the Mr. Bundy consented the child's enrollment in these activities, attended some games and historically shared the costs with her. (CP 153, CP 156-164).

In her Petition to Modify, Ms. Rush asked the court to require both parents to pay their proportionate share of the child's historical extracurricular costs. After Ms. Rush filed the petition, Mr. Bundy began refusing to contribute to the child's activities and later took the position that he should not have to do so. Pursuant to RCW 26.19.080, the trial court abused its discretion by not including that each parent shall pay their proportionate share of special child rearing expenses for the child. Otherwise, the child no longer receives the benefit of increased child support due to the father's voluntary unemployment and will not be able to participate in the historical activities to which both parents agreed is in the child's best interest.

5. The Court Should Not Award Attorney Fees To Mr. Bundy On Appeal.

Pursuant to RCW 26.09.140, the court may "from time to time after considering the financial resources of both parties" order a party to pay a reasonable amount of attorney fees to the other party.

In this case, the father is voluntarily unemployed. He receives retirement benefits in the amount of \$2,873 per month in addition to

rental income and profit from the house flipping business. He receives VEBA benefits in the amount of \$500 per month and he has access to a deferred compensation account worth in excess of \$200,000 and his business account in excess of \$300,000. Contrary to Mr. Bundy's contention that he solely has his pension to financially rely on, he provided a his Social Security statement and he will receive benefits when he is of retirement age as well as cost of living increases from his LEOFF 2 pension. Conversely, the mother earns \$8,258 gross per month on which she supports herself and her son. She does not have significant additional financial resources to rely upon and she has had to incur significant debt to afford this litigation from what should have been a routine increase in child support. Therefore, if anything, the court should award Ms. Rush her attorney fees on appeal.

III. CONCLUSION

Ms. Rush respectfully asks this court to reverse the trial court's Order of Child Support and grant this appeal.

Dated this 11th day of January, 2019.

Respectfully submitted,



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January 11, 2019 - 2:12 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51968-2
Appellate Court Case Title: Joseph A. Bundy, Respondent v. Pamela J. Rush, Appellant
Superior Court Case Number: 08-3-04395-8

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